

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER 96-0017 ITC

Gross Income Tax Withholding

For Years 1990 through and including 1993

**NOTICE:** Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

**1. Gross Income Tax – Withholding on Non-resident contractors**

Authority:

The taxpayer protested the assessment of tax based on the auditors' determination that the taxpayer should have withheld gross income tax on non-resident contractors.

STATEMENT OF FACTS

The taxpayer is located in Indiana. During the audit period, the taxpayer purchased various items of equipment from non-resident vendors. The vendors installed, tested and performed other services at the taxpayer's manufacturing facility in Indiana. The taxpayer also contracted with non-resident vendors for various service activities that were performed at the taxpayer's Indiana location. The auditor assessed gross income tax withholding on payments made by the taxpayer to the non-resident vendors.

DISCUSSION

**1. Gross Income Tax –Withholding on non-resident contractors.**

The taxpayer alleges that auditors assessed gross income tax withholding on all non-resident contractors. The taxpayer alleges that the assessment included payments to unincorporated vendors. The taxpayer also alleges that one of the vendors did in fact file Indiana income tax returns.

According to IC 6-2.1-2-2(a) "An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) ...

(2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana."

Under the gross income tax statutes, "Taxpayer" is defined as any group or combination acting as a unit including, but not limited to corporations, partnerships, joint ventures, lodge, and trust, but not including individuals. See IC 6-2.1-1-16. A withholding agent is defined as "...any individual firm, organization, or governmental agency that is required to withhold gross income taxes under IC 6-2.1-6." See IC 6-2.1-1-17. IC 6-2.1-6-1 states:

(a) As used in this section, "nonresident contractor" does not include a foreign corporation qualified to do business in Indiana.

(b) Except as provided in (c), each calendar year each individual, firm, organization, or governmental agency of any kind who makes payments to a nonresident contractor for performance of any contract, except contracts of sale, shall withhold from such payments the amount of gross income tax owed upon the receipt of those payments under this article....

(c) A withholding agent who withholds gross income tax pursuant to subsection (b) may not withhold any gross income tax for the first one thousand dollars (\$1,000) paid to a nonresident contractor during a calendar year.

The taxpayer raised the *Indiana Department of State Revenue v. Brown Boveri Corporation*, 439 N.E.2d 561 (Ind. 1982) to claim certain "turn key" transactions are not subject to gross income tax set forth at IC 6-2.1-2-2, but are exempt under the interstate commerce exemption. This situation is not analogous to *Brown Boveri*. The issue is not do the transactions fall within the purview of *Brown Boveri*, but did the taxpayer withhold gross income tax from nonresident contractors. The taxpayer is required to withhold on "nonresident contractors" unless it is a corporation qualified to do business in Indiana or clear that the transaction is not subject to the gross income tax. The taxpayer did not contend that any of the vendors in question were qualified to do business in Indiana, but the taxpayer alleged that withholding is not required unless the entity is incorporated. The taxpayer asserts that there were two unincorporated vendors and withholding was not required on these two entities. According to *Merriam Webster's Collegiate Dictionary, tenth edition*, "contractor" is defined as "one that contract to perform work or provide supplies b: one that contracts to erect buildings..." This definition of contractor does not eliminate an individual or any other entity. IC 6-2.1-6-1's only limitation on nonresident contractor is that withholding is not required if the nonresident contractor is register to do business in Indiana. Therefore, there is no requirement that the

entity must be incorporated to fall within the purview of these withholding provisions. A taxpayer for gross income tax purposes is defined in IC 6-2.1-1-16.

The taxpayer stated that one of the companies filed Indiana returns for tax years 1991, 1992 and 1993. After a review of the department's files, it has been determined that the taxpayer did not file Indiana returns for the years in question.

The taxpayer's final averment is that one of the entities was an individual and not subject to gross income tax, therefore, withholding was not required. If in fact the contractor were an individual, the taxpayer would not be required to withhold gross income tax, but in this instance, the person providing the services was doing business as a separate entity, not in his name only. It is unclear from the information provided whether or not the entity was an assumed name or a separate and distinct entity. Withholding is required unless it is clear that the taxpayer or income is not subject to the gross income tax.

#### **FINDINGS**

The taxpayer's protest is denied.